

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 8, 2001 Session

**STATE OF TENNESSEE DEPARTMENT OF HUMAN SERVICES v.
MICHELLE STEWART, PERSONAL REPRESENTATIVE OF THE
ESTATE OF CHARLIE MAE CURREN, DECEASED**

**A Direct Appeal from the Chancery Court for Davidson County
No. 99-3130-II The Honorable Carol L. McCoy, Chancellor**

No. M2000-00633-COA-R3-CV - Filed October 22, 2001

The Department of Human Services (DHS) instituted an action in chancery court pursuant to the Tennessee Adult Protection Act, T.C.A. § 71-6-101 et seq. (1995) after receiving a report of possible abuse, neglect, or exploitation of the respondent. The court appointed counsel to represent the respondent and also appointed a guardian ad litem to represent respondent. Subsequently, the court also appointed a temporary guardian to represent the interest of the respondent. After an evidentiary hearing, the trial court found that DHS had not carried its burden of proof required by the applicable statute and had failed to properly investigate the case before proceeding with the action. The trial court also ordered that DHS proceed with the filing of a conservatorship proceeding in the probate court which DHS did. Respondent's appointed attorney, guardian ad litem, temporary guardian, and later the conservator filed motions for assessment of fees and discretionary costs against DHS. The trial court granted the motions and assessed the fees and discretionary costs against DHS. DHS has appealed. We reverse.

Tenn.R.App.P. 3; Appeal as of Right; Judgment of the Chancery Court Reversed

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and HOLLY KIRBY LILLARD, J., joined.

Paul G. Summers, Attorney General and Reporter, Pamela A. Hayden-Wood, Assistant Attorney General, Nashville, For Appellant, Tennessee Department of Human Services
Samuel F. Anderson, Nashville, Attorney Ad Litem, For Appellee, Charlie Mae Curren
David A. Dearolf, Nashville, Guardian Ad Litem for Appellee, Charlie Mae Curren

OPINION

In a proceeding instituted by the Tennessee Department of Human Services (DHS) against respondent, Charlie Mae Curren¹, pursuant to Tennessee Adult Protection Act, T.C.A. § 71-6-101 et seq. (1995), the trial court found that DHS did not carry its burden of proof and dismissed the complaint. Prior to dismissing the complaint, the court suspended the hearing to allow DHS to file a conservatorship proceeding in probate court. During the pendency of the chancery court case, the court appointed an attorney for the respondent, a guardian ad litem for the respondent, and then subsequently appointed a temporary guardian for respondent charged with the responsibility of taking charge of respondent's assets, paying her bills, and otherwise being responsible for her welfare.

By various orders, the trial court assessed discretionary costs against the state (which included the guardian ad litem fees) assessed respondent's attorney's fees against the state, assessed the temporary guardian fees against the state, and assessed the conservator's fees against the state. The state has appealed, and the only issues for review are whether the trial court erred in its assessment of these various charges to the state.

Since the state has not presented an issue concerning dismissal of its complaint, it would extend this opinion to an unreasonable length and consume the time of the court for no useful purpose for us to review the various pleadings and the evidence at the hearing leading to the assessment of the charges at issue. We will therefore dispense with that procedure.

The first issue to consider is whether the trial court erred in assessing respondent's attorney's fees to the state and assessing the guardian ad litem fees to the state as part of discretionary costs.

¹ Ms. Curren died prior to the entry of the final order in the trial court. No suggestion of death was initially made, but the procedural error was corrected in the trial court, and the record in this Court supplemented accordingly.

The Tennessee Adult Protection Act under which the state proceeded provides for the filing of a complaint by the state to remove a subject adult from the chosen place of residence after making reasonable efforts to exhaust all practical alternatives for such removal. T.C.A. § 71-6-107

(a)(1)(A). The act further provides:

The adult has a right to be present and represented by counsel at the hearing. If the adult is indigent, or in the determination of the judge or chancellor, lacks capacity to waive the right to counsel, then the court shall appoint counsel. If the adult is indigent, court costs and the cost of representation shall be borne by the state; otherwise such costs shall be borne by the adult.

T.C.A. § 71-6-107 (a)(4) (1995).

The act further provides that if DHS determines that there is a need for protective services, and respondent lacks capacity to consent to such services, the department may then proceed by complaint setting forth specific facts showing that the adult is in need of protective services and lacks the capacity to consent. The act provides:

If the adult is indigent or, in the determination of the judge or chancellor, lacks capacity to waive the right to counsel, then the court shall appoint counsel. If the adult is indigent, court costs and the cost of representation shall be borne by the state; otherwise such costs shall be borne by the adult.

T.C.A. § 71-6-107 (b)(2) (1995).

It is conceded that respondent was not indigent. DHS asserts that under the above statutes there is no authority granted to assess costs and fees against the state.

Appellees assert that guardian ad litem fees may be taxed as costs pursuant to Tenn.R.Civ.P. 17.03 and that pursuant to Tenn.R.Civ.P. 54.04 discretionary costs may be assessed by the court. Appellees concede that under Tennessee law attorney's fees are only to be awarded if provided for

by contract, statute, or a recognized equitable ground. They argue, however, that the award in the instant case is a recognized equitable ground.

We first begin our inquiry by construing the applicable statute concerning the payment of costs and fees.

In interpreting legislative provisions, the court is to ascertain and give effect to the legislative intent without unduly restricting or expanding the statute's coverage beyond its intended scope. *Hathaway v. First Family Financial Services, Inc.*, 1 S.W.3d 634 (Tenn. 1999). The legislative intent must be ascertained from the natural and ordinary meaning of the statutory language read in the context of the entire statute without any forced or subtle construction which would extend or limit its meaning. *State v. Butler*, 980 S.W.2d 359 (Tenn.1998); *Chrisman v. Hill Home Development, Inc.*, 978 S.W.2d 535 (Tenn. 1998).

The above-quoted provisions of the applicable statutes indicate in plain language that the legislature intended that an adult respondent who is not indigent should be responsible for the costs and fees associated with a proceeding instituted for respondent's own protection. Moreover, the act further provides:

(7) If the department refuses to exercise the powers granted to it by subdivision (a)(1), any private non-profit agency representing disabled adults may proceed under subdivision (1), after giving notice to the department of intent to do so. If an order authorizing the provision of protective services results, the department's responsibilities are the same as they would have been if the department had sought the order. *If the court finds that an order authorizing the provision of protected services is not warranted, any agency proceeding under this subdivision will be responsible for the cost of the court-appointed attorney representing the individual for whom protective services were sought as well as court costs.*

T.C.A. § 71-6-107 (a)(7) (1995)(emphasis added).

In the latter quoted provision, the legislature specifically provided for assessment of costs against agencies other than the state acting pursuant to the statute. The statutory provisions concerning attorney's fees and costs uniformly provide for assessment to respondent unless the respondent is indigent, except in only one instance, i.e., when the state refuses to proceed, and a private, non-profit agency proceeds on its own. There is nothing in the statute to indicate any intention that the state is to be responsible for costs and fees if it fails to prevail on its complaint. However, it is quite clear that any other agency will be so responsible. The fundamental rule of statutory construction is that the mention of one subject in a statute means the exclusion of other subjects that are not mentioned. *Phillips v. Tennessee Technological University*, 984 S.W.2d 217 (Tenn. 1998). Giving the language of the statute its natural and ordinary meaning, the legislature did not provide for fees to be awarded against the state if the state was unsuccessful in its complaint.

Appellees assert that attorney's fees should be awarded as a recognized equitable ground. We do not agree. Although the state's action was dismissed because of lack of proof of abuse, neglect, or exploitation, the trial court recognized that the respondent was in need of care and protection and instructed DHS to institute conservatorship proceedings. The proof is clear and virtually undisputed that respondent was incapable of handling her own affairs and by virtue of DHS's action, she received the protection of an appointed guardian after her condition was made known to the court.

Appellees also assert that they should be awarded fees by virtue of T.C.A. § 20-12-134 (1994) which provides:

In all cases where any civil action is brought on behalf of the state, in law or equity, and the state shall be adjudged to pay all costs, such costs shall be paid out of the treasury, upon the same being properly certified.

This assertion is controlled by the decision of our Supreme Court in *In the Matter of Harris*, 849 S.W.2d 334 (Tenn. 1993). In *Harris*, DHS filed a petition to terminate parental rights of the mother and father after the child had been found to be dependent and neglected. An attorney was appointed as guardian ad litem for the mother and another was appointed guardian ad litem for the father. Subsequently, the guardians ad litem were awarded substantial fees by the trial court, DHS appealed. DHS contended that if the fees must be paid, it was the obligation of the county. The court dealt with the specific provisions concerning termination of parent rights and payment of fees in such proceedings, including the obligation of the county for the fees. The Court noted that Tenn.R.Civ.P. 17.03 provides for the appointment of a guardian ad litem for children and incompetent persons and provides that the court has the discretion to allow fees for such guardian ad litem to be taxed as costs. The Court also noted that Tenn.R.Civ.P. 54.04 (1) provides that court costs may be taxed against the state only when specifically authorized. The court rejected the argument that T.C.A. § 20-12-134 allows assessment of costs limited only by the trial court's determination. The Court stated:

The first consideration in determining if the fees can be charged against a state agency is that the statutory power to assess costs against the state is in derogation of the state's sovereignty and must be strictly construed. *State ex rel. Chanaberry v. Stooksbury*, 176 Tenn. 687, 689, 145 S.W.2d 775, 776 (1940).

Id. at 336.

In holding that the obvious intent of the legislation was to allow a limited award of guardian ad litem fees against the state only in specific instances, the Court noted that its statutory construction “is also consistent with the rule of construction that where there is a conflict between a special statute and a general statute, the special statute will be given effect. (citations omitted).”

Id. at 337.

In the instant case, the special statute quite clearly provides for fees or costs against the state only if the respondent is indigent, and the special statute must be given effect.

We will now consider the issue of whether the trial court erred in granting fees to the temporary guardian and the conservator.

The appointment of the temporary guardian by the court was obviously to protect that respondent's estate and in essence to perform the duties of a conservator. The purpose of appointing a conservator is to preserve the estate of an incompetent or disabled person. T.C.A. § 34-4-202 (1991 Repl.) For a detailed description of the duties and responsibilities of a conservator, *see Grahl v. David*, 971 S.W.2d 373 (Tenn.1998). Without going into great detail, suffice it to say that a conservator is charged with the duty of acting in the best interest of the conservatee, and, as such, is rendering service to the conservatee. Thus, the trial court should not have awarded temporary guardian fees nor conservator fees against the state but should have charged the fees to the respondent who received the benefit therefor. T.C.A. § 34-11-112 (1996 Repl.) allows reasonable compensation to be paid to a fiduciary for services rendered in the case of a minor or disabled person where there is prior court approval. In addition, T.C.A. § 34-11-113 (1996 Repl.) provides for payment by a fiduciary of costs deemed necessary by the court from the property of a minor or disabled person. Moreover, as to the conservator's fees, the trial court did not appoint the conservator, and the conservatorship was not in the trial court. The benefit to the estate accrued in the probate court where the conservator was appointed, and any fees for the conservator should be awarded by that court out of the respondent's estate.

Accordingly, the judgment of the trial court assessing fees and costs to the state is reversed. The case is remanded to the trial court for such further proceedings as may be necessary. Costs of the appeal are assessed against the appellee.

W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.